

February 12, 2003

D.T.E. 02-21-A

Global NAPs Inc.'s Adoption of the Terms of the Interconnection Agreement Between Global NAPs, Inc. and Verizon Rhode Island Pursuant to the Bell Atlantic/GTE Merger Conditions

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ORDER ON RECONSIDERATION

APPEARANCES: Keefe B. Clemons, Esq.  
Verizon Massachusetts  
185 Franklin Street  
Boston, MA 02110

FOR: VERIZON NEW ENGLAND, INC. D/B/A  
VERIZON MASSACHUSETTS  
Petitioner

Cameron F. Kerry, Esq.  
Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, PC  
One Financial Center  
Boston, MA 02111

-and-

William J. Rooney, Jr., Esq.  
General Counsel  
Global NAPs, Inc.  
89 Access Road  
Norwood, MA 02062

FOR: GLOBAL NAPS, INC.  
Petitioner

## ORDER ON RECONSIDERATION

### I. INTRODUCTION

On June 24, 2002, the Department of Telecommunications and Energy (“Department”) issued an Order in D.T.E. 02-21 (the “Rhode Island Agreement Order”) in which we approved a negotiated interconnection agreement between Verizon Rhode Island and Global NAPs, Inc. (“Global NAPs”) for adoption in Massachusetts (the “Rhode Island Agreement” or “Agreement”) pursuant to the Federal Communications Commission’s (“FCC’s”) BA/GTE Merger Order.<sup>1</sup> Although the Department approved the adoption of the Rhode Island Agreement in Massachusetts, the Department determined that, consistent with Federal law and Department precedent, Section 5.7.2.3 of the Agreement did not permit the recovery of reciprocal compensation for traffic bound for Internet service providers (“ISP-bound traffic”) in Massachusetts. Rhode Island Agreement Order at 15.

On July 24, 2002, Global NAPs appealed the Department’s Rhode Island Agreement Order to Federal court, asserting, *inter alia*, that the Department was obligated to adopt the evaluation of the Rhode Island Public Utilities Commission (“RI PUC”) regarding Section 5.7.2.3 of the Rhode Island Agreement, that the Department improperly relied on its D.T.E. 97-116 series of Orders when reaching its decision in the Rhode Island Agreement Order, and

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<sup>1</sup> Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of Domestic and International Section 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, Memorandum Opinion and Order, 15 FCC Rcd 14032 (2000) (“BA/GTE Merger Order”). The BA/GTE Merger Order requires Verizon, under certain circumstances, to permit requesting carriers to adopt in one state an interconnection agreement that was voluntarily negotiated in another state. See BA/GTE Merger Order at App. D, ¶ 32.

that the Department improperly applied Federal law. On August 30, 2002, Global NAPs filed with the Department a Petition for Reconsideration of the Rhode Island Agreement Order. On September 9, 2002, Verizon filed an Opposition to Global NAPs' Petition for Reconsideration.

## II. POSITIONS OF THE PARTIES

### A. Global NAPs

Global NAPs argues that the Department should reconsider and reverse its conclusion in the Rhode Island Agreement Order that Global NAPs is not entitled to reciprocal compensation for ISP-bound calls under Section 5.7.2.3 of the Rhode Island Agreement (Global NAPs Petition for Reconsideration at 1). Global NAPs asserts that because the United States District Court for the District of Massachusetts ("District Court") recently determined that the Orders on which the Department relied in reaching its conclusions in the Rhode Island Agreement Order are "contrary to federal law," and because a subsequent change in controlling law is a basis for reconsideration, the Department must reconsider its Rhode Island Agreement Order (*id.* at 1-2).<sup>2</sup> Global NAPs argues that the District Court's ruling in Global NAPs v. Verizon legally requires the Department to determine that compensation is payable for ISP-bound traffic under the Rhode Island Agreement (*id.* at 3). Global NAPs argues that, notwithstanding the District Court's ruling, there are several other reasons why the

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<sup>2</sup> On August 27, 2002, the District Court remanded to the Department three of the Department's Orders dealing with the issue of reciprocal compensation for ISP-bound traffic – D.T.E. 97-116-C (1999), D.T.E. 97-116-E (2000), and D.T.E. 97-116-F (2001) – that interpreted Verizon's interconnection agreement with WorldCom, Inc. ("WorldCom"). Global NAPs v. Verizon, 226 F. Supp. 2d 279 (D. Mass. 2002). On December 20, 2002, the Department issued its D.T.E. 97-116-G Remand Order, addressing the remand instructions of the District Court. Global NAPs and WorldCom have subsequently appealed the Department's D.T.E. 97-116-G Remand Order.

Department erred in the Rhode Island Agreement Order (id. at 3 n.3). For example, argues Global NAPs, the Department did not give full faith and credit to the decision of the RI PUC when it evaluated Section 5.7.2.3 of the Agreement, and, because the corporate entities that signed the Rhode Island Agreement are the same entities involved here, the Department should have determined that Verizon was estopped from claiming that no compensation was due (id. at n.3). Finally, Global NAPs argues that because its appeal of the Department's Rhode Island Agreement Order to Federal court is at an early stage, the Department can re-open this docket to consider the new information without interfering with the Federal court's jurisdiction over Global NAPs' appeal (id. at 2 n.2).

B. Verizon

In its Opposition, Verizon argues that the Department should deny Global NAPs' Petition for Reconsideration (VZ Opposition at 1). Verizon argues that the recent ruling of the District Court concluded that the Department had not interpreted the language of the interconnection agreements addressed in the Department's D.T.E. 97-116 proceeding pursuant to Massachusetts contract law (id. at 2). Verizon argues that the Department's Order in this case was based on the Department's review and interpretation of specific language in the Rhode Island Agreement (particularly Section 5.7.2.3 of the Agreement), and only made reference to the D.T.E. 97-116 series of Orders to illustrate its prior findings that the FCC had determined in the Internet Traffic Order<sup>3</sup> that ISP-bound traffic was non-local, interstate

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<sup>3</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Declaratory Ruling; Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, Notice of Proposed Rulemaking, FCC 99-38 (rel. February 26, 1999) ("Internet Traffic Order"). In March 2000, the United States (continued...)

traffic, and to show that the FCC's determinations in the Internet Traffic Order were consistent with the Department's finding that the payment of reciprocal compensation for ISP-bound traffic was contrary to public policy (id. at 2-3).

Moreover, Verizon argues that, even if the Department were to re-examine its decision in the Rhode Island Agreement Order, nothing in Global NAPs v. Verizon requires the Department to conclude that Section 5.7.2.3 of the Rhode Island Agreement entitles Global NAPs to receive reciprocal compensation for ISP-bound traffic pursuant to that Agreement (id. at 3). Therefore, argues Verizon, if the Department does determine that reconsideration is appropriate, it should affirm its conclusions in the Rhode Island Agreement Order that GNAPs is not entitled to reciprocal compensation after the issuance of the FCC's Internet Traffic Order (id. at 4).

### III. STANDARD OF REVIEW

The Department's Procedural Rule, 220 C.M.R. § 1.11(10), authorizes a party to file a motion for reconsideration within twenty days of service of a final Department Order. The Department's policy on reconsideration is well settled. Reconsideration of previously decided

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<sup>3</sup>(...continued)

Court of Appeals for the District of Columbia Circuit ("D.C. Circuit Court") vacated and remanded the FCC's Internet Traffic Order for further explanation. Bell Atlantic Telephone Cos. v. Federal Communications Comm'n, 206 F.3d 1 (D.C. Cir. 2000). In response to the D.C. Circuit Court's remand, in April 2001, the FCC issued Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98; Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, Order on Remand and Report and Order, FCC 01-131 (rel. April 27, 2001) ("Order on Remand"). In May 2002, the D.C. Circuit Court remanded the FCC's Order on Remand, but allowed the FCC's rules regarding compensation for ISP-bound traffic to stay in effect while the FCC addresses the Court's further remand. WorldCom, Inc. v. Federal Communications Comm'n, 288 F.3d 429, 433-34 (D.C. Cir. 2002).

issues is granted only when extraordinary circumstances dictate that we take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation. North Attleboro Gas Company, D.P.U. 94-130-B at 2 (1995); Boston Edison Company, D.P.U. 90-270-A at 2-3 (1991); Western Massachusetts Electric Company, D.P.U. 558-A at 2 (1987).

A motion for reconsideration should bring to light previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered. It should not attempt to reargue issues considered and decided in the main case. Commonwealth Electric Company, D.P.U. 92-3C-1A at 3-6 (1995); Boston Edison Company, D.P.U. 90-270-A at 3 (1991); Boston Edison Company, D.P.U. 1350-A at 4 (1983). The Department has denied reconsideration when the request rests on an issue or updated information presented for the first time in the motion for reconsideration. Western Massachusetts Electric Company, D.P.U. 85-270-C at 18-20 (1987); but see Western Massachusetts Electric Company, D.P.U. 86-280-A at 16-18 (1987). Alternatively, a motion for reconsideration may be based on the argument that the Department's treatment of an issue was the result of mistake or inadvertence. Massachusetts Electric Company, D.P.U. 90-261-B at 7 (1991); New England Telephone and Telegraph Company, D.P.U. 86-33-J at 2 (1989); Boston Edison Company, D.P.U. 1350-A at 5 (1983).

#### IV. ANALYSIS AND FINDINGS

Our procedural rules require parties to file motions for reconsideration "within 20 days of service of a final Department Order." 220 C.M.R. § 1.11(10). The Department recognizes a strong public interest in the finality of its Orders (CMS Generation Co., D.P.U. 92-166-A

at 5 (1993)), and the 20-day deadline serves the public interest by promoting this finality. See Ruth C. Nunnally d/b/a L & R Enterprises, D.P.U. 92-34-A at 4 (1993) (discussing extensions of 20-day judicial appeal period). Global NAPs filed its Petition for Reconsideration with the Department on August 30, 2002 – 67 days after issuance of the Department’s Rhode Island Agreement Order. Because of Global NAPs’ delay in filing its petition, the Department is required to determine whether Global NAPs has shown good cause for the Department to waive the express 20-day deadline for filing a request for reconsideration. See D.P.U. 92-166-A at 4-5; 220 C.M.R. § 1.01(4).<sup>4</sup> However, in its Petition for Reconsideration, Global NAPs failed to address good cause for its late-filing. Unexcused lateness is sufficient grounds to deny a reconsideration request, and, therefore, we deny Global NAPs’ Petition for Reconsideration on that basis.

Nevertheless, given the extensive resort to appellate review concerning the issue of reciprocal compensation for ISP-bound traffic, we will also base our decision on alternative grounds as well, for the sake of administrative and judicial efficiency, even though we view Global NAPs’ untimely filing and failure to address good cause for its untimeliness as sufficient reason to deny Global NAPs request for reconsideration.

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<sup>4</sup> Although the Department’s regulations do not contain a definition of good cause, the Department has defined good cause as follows:

Good cause is a relative term and it depends on the circumstances of an individual case. Good cause is determined in the context of any underlying statutory or regulatory requirement, and is based on a balancing of the public interest, the interest of the party seeking an exception, and the interests of any other affected party. [Boston Edison Co., D.P.U. 93-335-A at 4 (1992)].

We will first address Global NAPs' assertion that the Department's issuance of an Order on Reconsideration will not interfere with the Federal court's jurisdiction over Global NAPs' appeal of the Department's Rhode Island Agreement Order (Global NAPs Petition for Reconsideration at 2 n.2). Global NAPs provides no supporting authority for this assertion, and there is case law to suggest that a party appealing from an agency's final decision will be required to file a new appeal following a decision on the party's request for reconsideration of that agency decision. See TeleSTAR, Inc. v. Federal Communications Comm'n, 888 F.2d 132 (D.C. Cir. 1989).<sup>5</sup> However, because Global NAPs initiated both the appeal of the Department's Rhode Island Agreement Order to Federal court and the subsequent Petition for Reconsideration of that Order with the Department, we conclude that Global NAPs is willing to comply with whatever "jurisdictional" consequences ensue from its request for reconsideration while its appeal of the underlying Order is pending.

We also disagree with Global NAPs' assertion that "[u]nder the rationale of the Department's decision in D.T.E. 97-116-C, a subsequent change in controlling law is a basis for reconsideration" (Global NAPs Petition for Reconsideration at 2). In so asserting, Global NAPs misconstrues the Department's D.T.E. 97-116-C Order. In the D.T.E. 97-116-C Order, the Department granted a motion for modification of a prior Department Order after twice indicating in that prior Order that we would entertain such a motion if the FCC reached

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<sup>5</sup> Under TeleSTAR, a final agency action on a timely-filed request for reconsideration will not cause a prematurely filed petition for judicial review to ripen, but will instead render it a nullity. 888 F.2d at 134. But see, Paquette v. Department of Environmental Protection, 55 Mass. App. Ct. 844, 849 (2002) ("[T]he desirability of avoiding both piecemeal appeals and the disruption to orderly administrative decisionmaking . . . [are] valid considerations, but we take more a pragmatic and less an abstract view of finality, and do not think them dispositive here").



a different conclusion on the nature of ISP-bound traffic than our own (which, in fact, the FCC subsequently did). See D.T.E. 97-116 Order, at 5 n.11 (“[T]he FCC may make a determination in proceedings pending before it that could require us to modify our findings in this Order”), 6 n.12 (“[I]f modifications to this Order are necessary based on the results of the FCC’s proceedings, then the Department can make such changes at the appropriate time”). In making these qualifications, the Department was acknowledging that the parties to the interconnection agreement at issue in the D.T.E. 97-116 Order created the possibility for impermanence by linking the terms of that particular agreement to changing Federal law. D.T.E. 97-116-G Remand Order at 29-30. The Department was not creating the opportunity for parties to obtain reconsideration of any Department decision that may be affected by subsequent changes in law no matter how remote in time. In the Department’s Rhode Island Agreement Order, no such possibility of future modification was anticipated, and, as we discuss further below, no modification to the Rhode Island Agreement Order is warranted.

For the following reasons, we do not agree that the District Court’s ruling in Global NAPs v. Verizon provides the “extraordinary circumstances” necessary to support granting of Global NAPs’ request for reconsideration and reversal of the Rhode Island Agreement Order. In the District Court’s ruling, the Court concluded that the Department’s D.T.E. 97-116-C (1999), D.T.E. 97-116-E (2000), and D.T.E. 97-116-F (2001) Orders violated Federal law because the Orders failed to address whether the Verizon-WorldCom interconnection agreement provided for reciprocal compensation for ISP-bound traffic pursuant to Massachusetts contract law and other legal and equitable principles. See 226 F. Supp. 2d at 280 (expressly adopting the reasoning set forth in the Findings and Recommendations of the

Magistrate Judge). To address this deficiency, the District Court remanded the Orders to the Department for further proceedings or deliberations. Id. at 281. The District Court did not conclude that reciprocal compensation was due for ISP-bound traffic or that the Department erred in its conclusion that the parties' interconnection agreement did not require such compensation. See id. ("A district court's jurisdiction under § 252(e)(6) extends only to a determination of whether orders of a state utility commission . . . comply with [F]ederal law"). Therefore, Global NAPs erroneously asserts that the District Court ruling was a change in law such that the Department's conclusions in the Rhode Island Agreement Order must be reconsidered.

Further, the District Court's ruling in Global NAPs v. Verizon concerned the series of Department Orders that dealt with the interconnection agreement between Verizon and WorldCom.<sup>6</sup> The Rhode Island Agreement Order dealt solely with the Rhode Island Agreement, a separate and dissimilar agreement which the Department evaluated for adoption in Massachusetts pursuant to the FCC's BA/GTE Merger Order. The Department's references in the Rhode Island Agreement Order to the D.T.E. 97-116 series of Orders served to illustrate the Department's prior application of the FCC's Internet Traffic Order and the FCC's Order on Remand, and to show how the FCC's construction of interconnecting carriers' obligations under 47 U.S.C. § 251(b)(5)<sup>7</sup> has changed over time yet has remained

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<sup>6</sup> The District Court also included an earlier interconnection agreement between Verizon and Global NAPs in its analysis. See D.T.E. 97-116-G Remand Order at 7 n.8.

<sup>7</sup> Section 251(b)(5) of the Telecommunications Act of 1996 states that local exchange carriers must "establish reciprocal compensation arrangements for the transport and termination of telecommunications." The FCC has construed the scope of the

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consistent in the exclusion of reciprocal compensation for ISP-bound traffic as such compensation encourages inefficient market entry and unintended opportunities for regulatory arbitrage. Rhode Island Agreement Order at 3 n.2, 4 n.5, 13 n.9, 15-17.<sup>8</sup>

As we discussed in depth in the Rhode Island Agreement Order, in Section 5.7.2.3 of the Rhode Island Agreement, Verizon Rhode Island and Global NAPs agreed that the FCC's determination in CCB/CPD 97-30 (i.e., the proceeding that resulted in the FCC's Internet Traffic Order, and, ultimately, the FCC's Order on Remand) would provide "resolution of the issue" whether reciprocal compensation was due for ISP-bound traffic. Rhode Island Agreement Order at 14-15.<sup>9</sup> This "plain language" contained in the Rhode Island Agreement

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<sup>7</sup>(...continued)

reciprocal compensation obligation to apply to the transport and termination of "traffic exchanged between a [local exchange carrier] and a telecommunications carrier . . . except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access." 47 C.F.R. § 51.701(a).

<sup>8</sup> See also Internet Traffic Order at ¶ 26 n.87 ("We conclude in this Declaratory Ruling . . . that ISP-bound traffic is non-local interstate traffic. Thus, the reciprocal compensation requirements of section 251(b)(5) of the Act . . . do not govern inter-carrier compensation for this traffic"); Order on Remand at ¶ 30 ("[T]he service provided by [local exchange carriers] to deliver traffic to an ISP constitutes, at a minimum, 'information access' under section 251(g) and, thus, compensation for this service is not governed by section 251(b)(5) . . .").

<sup>9</sup> Section 5.7.2.3 of the Rhode Island Agreement states, in pertinent part:

The parties stipulate that they disagree as to whether traffic that originates on one Party's network and is transmitted to an Internet Service Provider ("ISP") connected to the other Party's network ("ISP Traffic") constitutes Local Traffic as defined herein, and the charges to be assessed in connection with such traffic. The issue of whether such traffic constitutes Local Traffic on which reciprocal compensation must [sic] be paid pursuant to the 1996 Act is presently before the FCC in CCB/CPD 97-30 and may be before a court of competent jurisdiction. The parties agree that the decision

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directs the Department to apply to the Rhode Island Agreement the FCC's construction of Federal law regarding reciprocal compensation obligations as contained in the FCC's Internet Traffic Order and the FCC's Order on Remand.<sup>10</sup>

Beginning with the Internet Traffic Order, the FCC has consistently and explicitly determined that ISP-bound traffic falls outside of section 251(b)(5)'s reciprocal compensation obligations, and, in incorporating by reference the FCC's "resolution of the issue" into Section 5.7.2.3 of their interconnection agreement, the parties likewise excluded the payment of reciprocal compensation for ISP-bound traffic from their obligations under the Rhode Island Agreement. The District Court's ruling in Global NAPs v. Verizon does not change this contract analysis.<sup>11</sup> Therefore, we conclude that Global NAPs has provided no basis upon which to support its request for reconsideration, and has failed to show good cause for its filing well outside the 20-day period provided by 220 C.M.R. § 1.11(10), and we thereby deny the request.

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<sup>9</sup>(...continued)

of the FCC in that proceeding, or as [sic] such court, shall determine whether such traffic is Local Traffic (as defined herein) and the charges to be assessed in connection with ISP Traffic. . . . Until resolution of this issue, [Verizon] agrees to pay [Global NAPs] Reciprocal Compensation for ISP Traffic . . . .

<sup>10</sup> Under Massachusetts contract law, the Department must give effect to the plain language of the Agreement and give terms their usual and ordinary meaning. See, e.g., 116 Commonwealth Condominium Trust v. Aetna Casualty & Surety Co., 443 Mass. 373, 376 (2001), and cases cited therein.

<sup>11</sup> We do not address Global NAPs' assertions that the Department should have adopted the RI PUC's interpretation of Section 5.7.2.3 of the Rhode Island Agreement, or that Verizon should have been estopped from denying reciprocal compensation was due for ISP-bound traffic, as these arguments were raised, considered, and decided in the underlying case.

V. ORDER

Accordingly, after due notice and consideration, it is

ORDERED: That the August 30, 2002 Petition for Reconsideration filed by Global  
NAPs, Inc. is denied.

By Order of the Department,

\_\_\_\_\_/s/\_\_\_\_\_  
Paul B. Vasington, Chairman

\_\_\_\_\_/s/\_\_\_\_\_  
James Connelly, Commissioner

\_\_\_\_\_/s/\_\_\_\_\_  
W. Robert Keating, Commissioner

\_\_\_\_\_/s/\_\_\_\_\_  
Deirdre K. Manning, Commissioner

Appeal of this Order shall be taken in accordance with applicable law. Timing of the filing of such an appeal is governed by the applicable rules of the appellate body to which the appeal is made.